

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 25 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

MICHAEL EDWARD GARDNER,

Appellant.

)  
)  
) 2 CA-CR 2009-0344  
) DEPARTMENT A  
)

) MEMORANDUM DECISION  
) Not for Publication  
) Rule 111, Rules of  
) the Supreme Court  
)  
)

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800794

Honorable Donna M. Beumler, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Kent E. Cattani and Sarah E. Heckathorne

Phoenix  
Attorneys for Appellee

Sarah Collier

Tucson  
Attorney for Appellant

ESPINOSA, Judge.

¶1 After a jury trial, Michael Gardner was convicted of transporting marijuana for sale and possessing drug paraphernalia. The trial court sentenced him to 4.5 years' imprisonment for the marijuana offense and .75 years for the paraphernalia offense. On appeal, Gardner contends the court erred in denying his motion to suppress evidence. We affirm.

### **Factual and Procedural History**

¶2 “In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court’s ruling.” *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). In May 2008, law enforcement officers stopped Gardner’s vehicle after observing him driving seventy miles per hour in a sixty-five-mile-per-hour zone and crossing the fog line on a stretch of highway. As an officer approached Gardner’s vehicle on foot, he attempted to drive away, but an officer in another police vehicle prevented him from doing so. Gardner was arrested, and a subsequent search of his vehicle revealed bales of marijuana in the back of his SUV. He later was convicted and sentenced as specified above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

### **Discussion**

¶3 Gardner contends for the first time on appeal that the officers lacked an objectively reasonable basis for the traffic stop. He argues that neither of the two grounds

given by law enforcement for stopping him “constituted a per se offense” and that they therefore “cannot serve as the objectively reasonable basis required for a stop.”

¶4 Before trial, however, Gardner moved to suppress the marijuana and any statements he had made to law enforcement officers on a different ground, arguing they had lacked reasonable suspicion to justify detaining him beyond the point that the alleged traffic infractions could have been dealt with, and no probable cause had existed to arrest him. At the suppression hearing, although Gardner had not challenged the basis for the stop, the officer who had stopped Gardner testified he had observed him travelling in excess of the posted speed limit and “swerv[ing] across, over the fog line.”

¶5 “To preserve an argument for review, the defendant must make a sufficient argument to allow a trial court to rule on the issue.” *Kinney*, 225 Ariz. 550, ¶ 7, 241 P.3d at 918; *see also State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) (“An objection is sufficiently made if it provides the judge with an opportunity to provide a remedy.”). And, “an objection on one ground does not preserve the issue for appeal on another ground.” *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008). Because Gardner failed to raise an objection to the basis for the stop in the trial court, he has forfeited the issue absent a showing of fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶6 Further, by failing to argue on appeal that the error is fundamental or prejudicial, Gardner has not carried his burden to establish such error, and we could consider the argument waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185

P.3d 135, 140 (App. 2008) (appellant’s failure to argue error fundamental waives issue on appeal); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607 (burden rests on defendant to establish fundamental error exists and caused resulting prejudice). In any event, we see no fundamental error here. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error it discovers).

¶7 Although Gardner contends that crossing the fog line once is not a violation of A.R.S. § 28-729(1) and cannot serve as the objectively reasonable basis for a traffic stop, we need not consider this issue because Gardner’s detention clearly was justified by the officer observing him driving at speeds above the posted limit, which is a violation of A.R.S. § 28-701(B)(3) and a well-established basis for a traffic stop. *See State v. Ossana*, 199 Ariz. 459, ¶¶ 3, 8, 18 P.3d 1258, 1259, 1260 (App. 2001) (officers had right to stop vehicle they “observed . . . driving faster than the posted limit”); *see also A.R.S. § 28-1594* (officers “may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of this title”). Moreover, whether the officers reasonably determined Gardner’s speed by pacing him as opposed to radar measurement was a factual determination for the trial court, not this court. *See State v. Hummons*, 225 Ariz. 254, ¶ 11, 236 P.3d 1201, 1204-05 (App. 2010) (trial court, not appellate court, assesses witness credibility at suppression hearing). Because the evidence established reasonable suspicion for a traffic stop of Gardner’s vehicle, he has failed to carry his burden of showing any error occurred, let alone fundamental error. *See State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984) (Fundamental error goes “to the foundation of the case,

error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.”).

### **Disposition**

¶8 Gardner’s convictions and sentences are affirmed.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Presiding Judge